FILE COPY

APR 27 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1490

TIME, INC.,

Petitioner,

v.

MARY ALICE FIRESTONE,

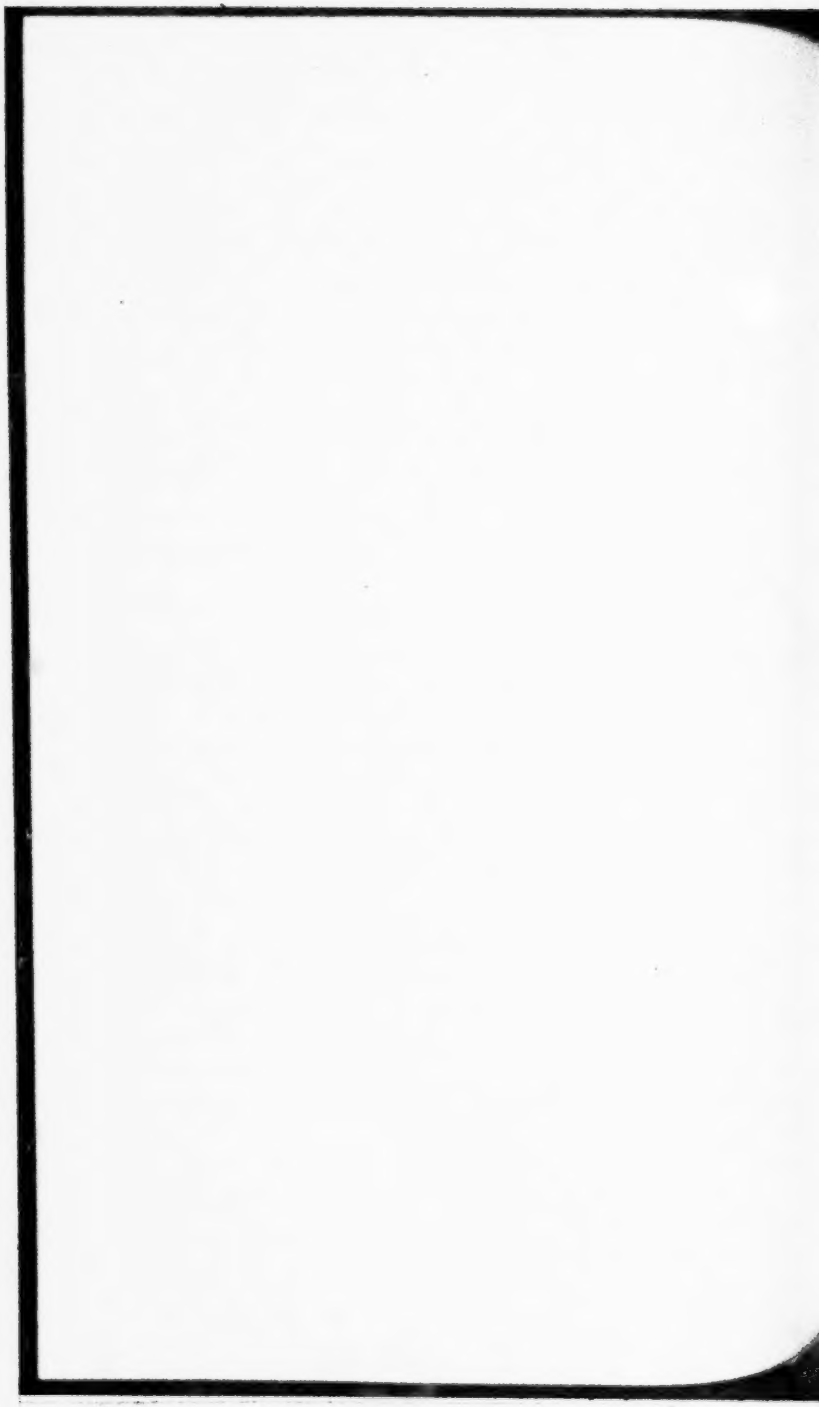
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HAROLD R. MEDINA, JR.,
One Chase Manhattan Plaza,
New York, N. Y. 10005
Attorney for Petitioner.

FRATES, FAY, FLOYD & PEARSON,
WILLIAM S. FRATES,
LARRY S. STEWART,
12th Floor,
Concord Building,
Miami, Florida 33130

W. DENNIS CROSS
CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005
Of Counsel.



INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
OPINION AND ORDERS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
A. Applicability of the Constitutional Standard	10
B. Necessity for Summary Judgment	15
CONCLUSION	21
APPENDIX A	
District Court Opinion and Order Denying Motion for Summary Judgment and Certifying Order as Appropriate for Appeal	A1
APPENDIX B	
Fifth Circuit Order Denying Leave to Appeal	B1
APPENDIX C	
Fifth Circuit Order Denying Petition for Rehearing	C1

TABLE OF AUTHORITIES

PAGE

CASES:

Beckley Newspapers Corp. v. *Hanks*, 389 U. S. 81 (1967) 8, 20

Bon Air Hotel, Inc. v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969) 8, 12, 18

Cerrito v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969) 8, 12, 15, 18

Curtis Publishing Co. v. *Butts & Associated Press* v. *Walker*, 388 U. S. 130 (1967) 8, 9, 12, 13, 20

Dombrowski v. *Pfister*, 380 U. S. 479 (1965) 9, 16

Garrison v. *Louisiana*, 379 U. S. 64 (1964) 8, 9, 19

Harkaway v. *Boston Herald Traveler*, 418 F. 2d 56 (1969) 9

Henry v. *Collins*, 380 U. S. 356 (1965) 8, 19

Hurley v. *Northwest Publications*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968) 8, 18

In re 620 Church St. Corp., 299 U. S. 24 (1936) 2

Klahr v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (1966) 8

New-Journal Co. v. *Gallagher*, 233 A. 2d 166 (Del. 1967) 8, 18

New York Times v. *Sullivan*, 376 U. S. 254 (1964) 8, 9, 10, 12, 13, 14, 15, 19, 21

Pape v. *Time, Inc.*, 419 F. 2d 980 (7th Cir.), *rev'g* 294 F. Supp. 1087 (N. D. Ill. 1969) 14

Rosenblatt v. *Baer*, 383 U. S. 75 (1966) 8, 9, 10, 12

Rosenbloom v. *Metromedia*, 415 F. 2d 892 (3d Cir. 1969), *cert. granted*, 38 U. S. L. W. 3309 (U. S. Feb. 24, 1970) 8, 12

Ryan v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968) 8, 18

St. Amant v. *Thompson*, 390 U. S. 727 (1968) 8

Sellers v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969) 8, 12, 18

BLEED THROUGH, POOR COPY

PAGE

Tagawa v. *Maui Pub. Co.*, 448 P. 2d 337 (Hawaii 1968), *cert. denied*, 396 U. S. 822 (1969) 8, 9, 18

Thompson v. *Evening Star*, 394 F. 2d 774 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884 (1968) 8, 9, 18

Thornhill v. *Alabama*, 310 U. S. 88 (1940) 13

Time, Inc. v. *Hill*, 385 U. S. 374 (1967) 8, 9, 11, 15

Time, Inc. v. *McLaney*, 406 F. 2d 565 (5th Cir.), *cert. denied*, 395 U. S. 922 (1969) 8, 9, 12, 15, 18

United Medical Laboratories, Inc. v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969) 8, 9, 12, 18

United States Alkali Export Ass'n, Inc. v. *United States*, 325 U. S. 196 (1945) 2

Walker v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968) 8, 18

Washington Post v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967) .8, 9, 17-18

UNITED STATES CONSTITUTION:

Amendment I 4

Amendment XIV § 1 4

UNITED STATES STATUTES:

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1292(b) 1, 2, 4, 7

28 U. S. C. § 1651(a) 2

OTHER AUTHORITIES:

Brennan, *The Supreme Court and The Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) 13

Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581 (1964) 10-11

BLEED THROUGH, POOR COPY

IN THE

Supreme Court of the United States

October Term, 1969

No.

TIME, INC.,

Petitioner,

v.

MARY ALICE FIRESTONE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Plaintiff seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit from an order of that court, denying petitioner leave to appeal from an order of the United States District Court for the Southern District of Florida, Miami Division, which denied petitioner's motion for summary judgment. The District Court had previously certified its order as appropriate for appeal pursuant to 28 U. S. C. § 1292(b).

OPINION AND ORDERS BELOW

The original opinion and order of the District Court denying the motion for summary judgment and certifying its order as appropriate for appeal, entered December 2, 1969, is attached hereto as Appendix A. The order of the Court of Appeals for the Fifth Circuit, denying leave to appeal, entered January 29, 1970, is attached hereto as Appendix B. The order of the Court of Appeals for the Fifth

Circuit denying petitioner's application for rehearing, entered March 24, 1970, is attached hereto as Appendix C.

JURISDICTION*

The order of the Court of Appeals denying petitioner's leave to appeal was entered January 29, 1970, and the order denying petitioner's application for rehearing was entered March 24, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Is a publication dealing with matters of public interest protected from civil liability, absent a showing of knowledge of falsity or serious doubts as to truth, by the constitutional guarantees of freedom of speech and the press?

2. Is the protection lost by relating an incident illustrative of that matter of public interest, merely because the matter of public interest could have been reported without the illustration?

3. Is a publication dealing with the private uses of wiretapping, bugging and electronic invasions of privacy a matter of public interest?

4. Is a former beauty queen who has married a millionaire socialite, received great attention in social circles

*Since no specific authority has been found (although we do not believe one is needed) allowing this petition from a denial of an application under 28 U. S. C. § 1292(b), by petition filed simultaneously herewith, petitioners are also applying for common law writs of certiorari pursuant to 28 U. S. C. § 1651(a), directed to the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Florida, Miami Division, in accordance with the doctrines established by this Court in *In re 620 Church St. Corp.*, 299 U. S. 24 (1936), and *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U. S. 196 (1945).

BLEED THROUGH POOR COPY

for over ten years, and is party to a much-publicized divorce proceeding in which private detectives and electronic surveillance have been utilized on both sides a "public figure" within the meaning of the constitutional protection?

5. If the protection is available, is an issue of fact created by an offer of proof that the publication in question is untrue and that the publisher was negligent in failing to discover its untruth, where it has been established that the publication was made without any doubts on the part of any responsible person as to its truth?

6. If the protection is available, is an issue of fact created by an offer of proof that the publisher's reporter in the field bore personal ill will toward the plaintiff, without an allegation that either he or any of those responsible for the publication had knowledge of its falsity or serious doubts as to its truth?

7. Was the publisher justified in relying on a dispatch from its reporter in the field whom the publisher had known for some time and who had a high reputation for accuracy and trustworthiness?

8. Did the District Court err in denying summary judgment in an action for libel when it was uncontroverted and uncontrovertible that:

(a) the article in question involved a matter of legitimate public interest,

(b) the publication was based upon the report of an experienced and nationally respected journalist, and

(c) both the journalist who made the report and those responsible for publication were free from any doubt whatsoever as to the truth of the publication and remain free from such doubt to this day?

9. Did the Court of Appeals err in refusing to grant petitioner leave to appeal from the District Court's denial of

summary judgment, following the District Court's certification of the appeal pursuant to 28 U. S. C. § 1292(b)?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

Mary Alice Firestone, the plaintiff, is a former beauty queen, third wife of Palm Beach society millionaire Russell Firestone, and party to one of the most publicized divorce suits of the decade. She seeks to recover six million dollars in compensatory and punitive damages from the petitioner herein for injury which she claims to have sustained as a result of an allegedly defamatory article appearing in the May 20, 1966, issue of Life Magazine entitled "Snooping Electronic Invasion of Privacy". The article complained of

BLEED THROUGH POOR COPY

contains a photograph of the Firestones with an accompanying caption which reads:

> "Two-Way Snoop. In Florida, where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire man,' was hired by tire heir Russell Firestone to keep tabs on his estranged wife Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and, says Harwood, 'He plays just as rough with the bugs as I do.' A court recently ordered Russell and Mary Alice (*right*) to stop spying on each other."

Mrs. Firestone had filed suit for separate maintenance in November 1964, and her husband had counterclaimed for divorce on the grounds of extreme cruelty and adultery. In her suit, according to the Miami Herald, she complained about the surveillance activities of private detectives hired by her husband. During the pendency of the action, in January 1966, it was reported that a court order had forbade "surveillance by private detectives and wiretapping telephones or any other such tactics" by either party. On April 16, 1966, the same order was again reported by the Herald in connection with a $100,000 suit filed by Mrs. Firestone against a private detective for "openly shadowing her".

Meanwhile, wiretapping and eavesdropping—made possible on an ever greater scale by the increased sophistication of available equipment—had become a matter of great public interest and concern. The questions raised by the increasing frequency of their use and their great potential for destruction of privacy had led to a widespread public debate which continues to this day. In the spring of 1966,

Life Magazine began work in a feature article on the subject, and Life stringer David Chandler was assigned to investigate the nature and prevalence of snooping activity in New Orleans and Florida.

Chandler, an experienced reporter, undertook a detailed investigation during which he learned of the activities of Jack Harwood, a Palm Beach private detective who claimed to be a "fantastic wire man". Harwood had been hired by Russell Firestone to keep tabs on Mary Alice and to lend his assistance in the then pending divorce suit. Chandler felt that the role of electronic surveillance in the notorious Firestone divorce was an ideal illustration of the private uses of bugging and wiretapping techniques with which the Life article was to deal.

Chandler's interest was heightened when he learned that Carl Geisler, a former assistant of Harwood's, had "sold out" to Mary Alice. He first learned this from Harwood, then confirmed it with Geisler and Mrs. Firestone, and with Mrs. Firestone's attorney, Joseph Farish, Jr. He also learned that the court in which the divorce case was pending had ordered the Firestones to stop spying on each other.

The methods employed by the investigators during the divorce proceeding, as well as Geisler's switch in allegiance, convinced Chandler that this story was of particular significance, not only as an illustration of snooping activities, but as an example of the opportunities for the double-cross inherent in such practices. He therefore included the story in his dispatches to Life.

Chandler's dispatches were received by Life editor Richard Billings, who then proceeded to write the "Two-Way Snoop" caption based on those reports. Because of Chandler's long and satisfactory relationship with the magazine, and his consistent accuracy and trustworthiness as a correspondent, Billings had no hesitation in relying on his dispatches. In addition, Billings had the caption rechecked

by researcher Alan Patureau and by Chandler himself. The caption as it appeared was in complete accord with the results of Chandler's investigation. No one on Life's staff had then or has today any doubt whatsoever as to the truth of the caption.

Based on the foregoing facts, all of which appear from undisputed depositions and affidavits of the principals involved, petitioner moved for summary judgment in the District Court on the basis that the publication was constitutionally protected under the First Amendment guarantees of freedom of speech and press because it concerned a matter of legitimate public interest and was published without knowledge of falsity or serious doubts as to truth. Petitioner also moved the District Court, in the event that it denied its motion to dismiss or for summary judgment, to certify that its order involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, which would provide the foundation for an interlocutory appeal pursuant to 28 U. S. C. § 1292(b). The District Court denied petitioner's motion for summary judgment and granted petitioner's motion for certification of an interlocutory appeal pursuant to 28 U. S. C. § 1292(b).

Subsequently, petitioner applied to the United States Court of Appeals for the Fifth Circuit for leave to appeal. By order dated January 29, 1970, the Fifth Circuit Court of Appeals denied that petition. On February 10, 1970, a petition for rehearing was filed in the Court of Appeals. On March 24, 1970, that petition for rehearing was denied.

Certified copies of the record in the District Court and in the Court of Appeals will be filed with this petition, reference to which establishes the facts as set out above.

REASONS FOR GRANTING THE WRIT

This case presents an opportunity for this Court to establish beyond doubt two propositions which, in petition-

er's view, are integral elements of the protection afforded publishers by the First Amendment guarantees of freedom of speech and the press, have been squarely adopted by several Courts of Appeals, but which the District Court below declined to apply in this case. The first of these is that the First Amendment insulates from civil liability any publication dealing with a matter of legitimate public interest, absent a showing that the publication was made with knowledge of its falsity or with serious doubts as to its truth.* The second is that where, as here, it is established on pleadings and discovery that no such knowledge or serious doubts existed, summary judgment is not only appropriate but is mandated by the First Amendment.**

**See, e.g., New York Times* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Curtis Publishing Co.* v. *Butts & Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir.), *cert. denied*, 395 U. S. 922 (1969); *Rosenbloom* v. *Metromedia*, 415 F. 2d 892 (3d Cir. 1969), *cert. granted*, 38 U. S. L. W. 3309 (U. S. Feb. 24, 1970); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Sellers* v. *Time, Inc.*, 299 F. Supp 582 (E. D. Pa. 1969); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969). *The decision of the District Court, which the Circuit Court declined to review, is in direct conflict with these decisions.*

***See, e.g., Washington Post* v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967); *United Medical Laboratories, supra; McLaney, supra; Thompson* v. *Evening Star*, 394 F. 2d 774 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884 (1968); *Walker* v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968); *Hurley* v. *Northwest Publications*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (1966); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *New-Journal Co.* v. *Gallagher*, 233 A. 2d 166 (Del. 1967); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Hawaii 1968), *cert. denied*, 396 U. S. 822 (1969). *The decision of the District Court, which the Circuit Court declined to review, is in direct conflict with these decisions.*

In denying leave to appeal, the Court of Appeals let stand a District Court opinion which is in direct conflict with applicable decisions of this Court and numerous lower courts in declining to apply *New York Times* standards to this litigation. Because petitioner is thus required to go to the expense of a common-law libel trial, notwithstanding the fact that the publication in question concerned a matter of legitimate public interest and was published in the good faith belief that it was true, a severe burden is placed on its exercise of First Amendment rights.

We had thought that this Court by its language in *New York Times* (p. 269), *Garrison* (pp. 74-5), *Rosenblatt* (p. 86) and *Butts* (pp. 150-152), by its direct holding in *Hill* (pp. 387-8), although limited to privacy (p. 397), and by its denial of certiorari in *United Medical* and *McLaney* had clearly indicated its view that public interest in the subject matter of an article was the basis for imposition of constitutional protection. Apparently it is now necessary explicitly so to hold. See, for instance, the recent decision for the Court of Appeals of the First Circuit in *Harkaway* v. *Boston Herald Traveler,* 418 F. 2d 56 (1969), which still talks solely in terms of public official. This case presents that opportunity. We urge that the Court avail itself of it.

We had thought that this Court by its reference to the "chilling effect" of expense of trial in *New York Times* (p. 279), *Hill* (p. 389) and *Dombrowski* (p. 487) and by its refusal to grant certiorari from decisions granting summary judgment in *Keogh, Thompson, United Medical, McLaney* and *Tagawa, supra,* had clearly indicated its view that summary judgment was a necessary constitutional corollary to the *New York Times* doctrine. Apparently, it is now necessary explicitly so to hold in order that responsible journalists may receive that protection. This case presents that opportunity. We urge that the Court avail itself of it.

A. Applicability of the Constitutional Standard

Because in publishing the caption at issue in this case it was reporting on a matter of legitimate public interest, petitioner submits that it is entitled to the protection of the First Amendment and that plaintiff is barred from recovery unless the caption was published with knowledge of falsity or reckless disregard of the truth.

The references to "public officials" and to the rule of official privilege in *New York Times* initially misled some courts into restricting the constitutional doctrine there announced to statements made concerning persons holding political office. This Court quickly moved to make clear, however, that the basis for the protection was not to be found in any such restricted interpretation. In *Rosenblatt* v. *Baer, supra,* 383 U. S. at 84-85 n. 10, in rejecting the suggestion "that we have tied the *New York Times* rule to the rule of official privilege", the Court cited with approval Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L. Q. 581 (1964). In that article Professor Pedrick stated the basis for the *New York Times* rule as follows:

> "'. . . . If a qualified "good faith" privilege is needed to better assure open debate then the privilege ought to extend as stated by Judge Burch of Kansas to "all matters of public concern." The logic is simple. In modern democratic society the public judgment makes itself felt on a great variety of subjects in a great variety of ways, official and unofficial. If decision on these matters is to be adequately informed every effort ought to be made to free the channels of communication with respect to these subjects. . . . The determination of "matters of public concern" should thus become the key to the application of the privilege recognized in the *Times* decision.'" p. 592.

Pedrick argued that the protection went far beyond comment directed at public officials:

> " '. . . . But those matters which are of public concern also go beyond the immediate province of government. A threatened labor strike affecting a critical industry may not provide any immediately discernible role for public opinion but who would doubt the legitimacy of the public concern and the strategic significance of the public attitude. Even such pedestrian matters as the closing hours observed by business establishments, the hiring, retention, or dismissal of a symphony conductor or an athletic coach would seem clearly matters of proper public concern with respect to which the popular will plays a role.' " p. 593 (footnotes omitted)

It soon became apparent that further expansion of the privilege along the lines indicated by Professor Pedrick was necessary if the clear demands of the First Amendment were to be satisfied. As the Court observed in *Time, Inc.* v. *Hill, supra,* in applying the protection to invasion of privacy cases:

> " 'The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. . . . Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ". . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'. . . ." *New York Times Co.* v. *Sullivan, supra,* at 271-272. . . .' " 385 U. S. at 388.

Then, in *Butts* and *Walker, supra,* the Court squarely applied the *New York Times* standard to publications concerning a football "fix" and racial integration, respectively, notwithstanding that the plaintiffs were not public officials, noting that the "public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times.*" 388 U. S. at 154.

It is apparent that the true basis for the decisions of this Court under the *New York Times* doctrine is to be found in legitimate public interest in the content of the publication. A number of lower courts have so held, and have adopted "public interest" as the criterion for application of the First Amendment protection. *E.g., Rosenbloom* v. *Metromedia, supra; Time, Inc.* v. *McLaney, supra; United Medical Laboratories* v. *CBS, supra; Cerrito* v. *Time, Inc., supra; Sellers* v. *Time, Inc., supra; Bon Air Hotel* v. *Time, Inc., supra.*

These cases have recognized that, since it is expression which the First Amendment protects, it is the subject matter of the expression and not the identity of the particular plaintiff which must be the focus of the constitutional inquiry. "The public interests protected by the *New York Times* rule are interests in discussion, not retaliation." *Rosenblatt* v. *Baer, supra,* 383 U. S. at 84-85 n. 10. Thus, the Court of Appeals stated in *United Medical Laboratories*:

> "[T]hough limelight may be a factor in public interest occurring, it can hardly be held to constitute a condition for the right of public interest to exist. Indeed, in the case of Mr. Butts at least, the factor of limelight would seem to have been a relatively subordinate one in the national publication involved.
>
> "The primary basis of general interest in the *Butts* situation would have to be regarded as the

BLEED THROUGH POOR COPY

public's right to be concerned over the nature and significance of the things alleged to have been done, with the persons said to have done them being secondary elements therein." 404 F. 2d at 712.

This view accords with Professor Meiklejohn's thesis that the First Amendment is the primary instrumentality through which a free people exercises its sovereign decision-making power. *See* Brennan, *The Supreme Court and The Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965). It is an unduly narrow interpretation of the principles announced in *New York Times* to characterize them as merely a new privilege engrafted onto the law of libel. Such a view leads to distinctions too easily made and sanctions for expression too easily imposed. Their basis is rather to be found in the statement in *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940), quoted by Justice Harlan in *Butts,* that "Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period".

The publication is this case clearly dealt with a matter of legitimate public interest. It is just such matters as to which the First Amendment guarantees unfettered discussion. The District Court's assertion that, although the subject of the private use of electronic snooping devices was of legitimate public interest, the story of the *plaintiff's* use of such devices was not, is simply untenable. Such a rule would make it virtually impossible to report on any matter of public concern, since the publisher would be reduced to making abstract assertions completely devoid of concrete examples. Such writing would not be reporting at all, but merely theorizing.

That the District Court could reach such a conclusion illustrates the inadequacy of the "public figure" test without

an appreciation of the basic public interest foundation of the *New York Times* rule. Here the plaintiff was a well-known participant in a widely publicized divorce case, and thus a "public figure" by any reasonable construction of the term. But can it be doubted that the result should be the same if she were not? The very essence of the Life article was the use of wiretapping and bugging by private citizens for private ends, and the need for public awareness of the prevalence of such practices and of the inadequacy of present laws addressed to the problem. To deny a publisher the protection of the First Amendment when it reports instances of such practices would be to deny the public its right to be informed on a matter regarding which it has a vital and legitimate concern.

What the District Court has done in effect is to attempt to exercise a purely editorial judgment by judicial process. In *Pape* v. *Time, Inc.*, 419 F. 2d 980 (7th Cir.), *rev'g* 294 F. Supp. 1087 (N. D. Ill. 1969), presently the subject of another petition for certiorari addressed to this Court, the Court of Appeals for the Seventh Circuit indicated that it would require the publisher to *include* a fact which the Court thought relevant but the publisher, in good faith, thought irrelevant. Here, the District Court would have the publisher *exclude* reportage of an incident which the Court thought improperly included but which the publisher, in good faith, thought to be relevant and appropriate as well as true. Both kinds of judicial second-guessing of good faith editorial decisions are prohibited by the First Amendment.

This limitation on judicial power is and must be unaffected by the degree of public notoriety which the plaintiff has acquired. To the extent, then, that the courts speak of "public figures" in the context of the *New York Times* rule, they must mean a figure in whom the public has an interest or who is participating in activities in which the

BLEED THROUGH POOR COPY

public has an interest, and not necessarily a figure who seeks publicity or is famous in his own right. Thus, the activities of a foreign spy ring or a criminal syndicate theretofore entirely unknown would be a subject of constitutionally protected expression, notwithstanding the strong preference for anonymity on the part of the individuals involved. Such, in fact, was the case in both *Time, Inc.* v. *McLaney, supra,* and *Cerrito* v. *Time, Inc., supra,* and led the courts in those cases to adopt the public interest test. Here, by indulging in the practices with which the article was concerned, Mrs. Firestone became to that extent a fair subject of public comment. In this sense, she became a "public figure".

It is clear that the essence of the protection afforded publishers by the First Amendment lies in the public interest test. This has been recognized by many courts and commentators as well as in the language of this Court's opinions; the time is now ripe to so hold directly and thus to set the First Amendment privilege on the firm ground which will make possible its more rational application in future cases.

B. Necessity for Summary Judgment

This Court has correctly noted that the constitutional infirmity of the common law of libel lies in the fact that publishers "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times* v. *Sullivan, supra,* 376 U. S. at 279. *See also Time, Inc.* v. *Hill, supra,* 385 U. S. at 389. Thus, it is recognized that the very maintenance of a lawsuit, with the uncertainty and expense entailed in an extended trial of the facts, imposes a burden on publishers of statements on matters of

public concern which is inconsistent with the First Amendment.

While the normal processes of trial and appeal are normally considered adequate for the protection of substantive rights, the overriding importance of the First Amendment guarantees of freedom of expression present a clear exception, because when such rights are at stake the burden of trial itself may amount to an unconstitutional hardship. Recognition of this fact has led this Court even to enjoin state criminal prosecutions which threaten First Amendment freedoms. In *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-7 (1965), the Court said:

> ". . . . Because of the sensitive nature of the constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser . . . [W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

The necessary corollary to application of the First Amendment standard in libel cases is that, when the defendant publisher makes a proper showing of his editorial process with respect to the challenged publication so as to preclude the possibility that he published with knowledge of falsity or reckless disregard of the truth, summary judgment must be granted. That this is an essential element of the constitutional protection has been recognized by a

BLEED THROUGH POOR COPY

number of lower courts. Thus, in *Washington Post* v. *Keogh, supra,* as here, defendant appealed from the trial court's denial of its motion for summary judgment. In reversing, the Court stated:

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' *Smith* v. *People of California,* 361 U. S. 147, 154, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959)." 365 F. 2d at 968.

The Court concluded:

> ". . . . The actual malice test, designed to give practical effect to this commitment, precludes an

issue of fact in this case." *Id.* at 972 (footnote omitted)

The principle established in *Keogh* has been followed in a number of cases where First Amendment rights were at stake in libel actions. *Time, Inc.* v. *McLaney, supra,* like *Keogh,* was a case in which the Court of Appeals reviewed the trial court's denial of summary judgment. Because of the important First Amendment principles involved and because the defendant had demonstrated by a showing of its editorial process that it could not have had the knowledge or recklessness necessary to defeat the constitutional protection, the court reversed, noting that "the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski* v. *Pfister* . . . because of the chilling effect of such litigation." 406 F. 2d at 566. Summary judgment has also been recognized as an indispensable part of the constitutional protection in *Thompson* v. *Evening Star, supra; Walker* v. *Pulitzer Publishing Co., supra; United Medical* v. *CBS, supra; Cerrito* v. *Time, Inc., supra; Sellers* v. *Time, Inc., supra; Bon Air Hotel* v. *Time, Inc., supra; Hurley* v. *Northwest Publications, supra; Tagawa* v. *Maui Pub. Co., supra; New-Journal Co.* v. *Gallagher, supra;* and *Ryan* v. *Dionne, supra.** This Court denied certiorari in *Keogh, Thompson, United Medical, McLaney* and *Tagawa.*

No issue of fact under the constitutional standard has been presented in this case. Uncontradicted testimony of those responsible for the caption has conclusively established their good faith in the accuracy of the publication. Far from being chargeable with knowledge of falsity or serious doubts as to truth, petitioner represents to this

*Petitioner was the defendant in *McLaney, Cerrito, Sellers* and *Bon Air.* The editorial process upon which the courts relied in those cases was substantially the same as that involved here.

Court today, as it did to the District Court, that it still believes the publication to be true in every respect..

Apparently the District Court does not disagree with petitioner's contention that it published the caption with a good faith belief in its truth, although it is difficult from a reading of the opinion to detect the exact basis for its holding. Beyond the obvious result that the publisher was held not to be entitled to summary judgment, the opinion is singularly unenlightening. First it denies, without stating a reason, that Mrs. Firestone is a public figure. Then it concedes that the article concerns a subject of public interest, but states that that does not apply to the individual illustration of that subject which mentions the plaintiff. Following these assertions, the Court *assumes* the applicability of the constitution and reviews some factual issues which it says are unresolved but which have no bearing on the publisher's knowledge of falsity or reckless disregard of the truth. Finally, the Court makes the gratuitous observation that Life could have written the article without mentioning Mrs. Firestone.

In view of the District Court's opinion, petitioner confesses to some puzzlement as to what it is expected to prove at trial. The Court refers to Mrs. Firestone's affidavit in which she claims Chandler told her she would be sorry after she rejected his offer to write a complimentary story in return for sexual favors. It is clear from this Court's decisions, however, that intent to harm does not amount to actual malice under the First Amendment standard absent a showing of knowing or reckless falsehood. *Garrison, supra,* 379 U. S. at 73; *Henry* v. *Collins, supra,* 380 U. S. at 357. Further, the knowledge of falsity or reckless disregard of the truth which must be shown must be that of "the persons . . . having responsibility for the publication". *New York Times, supra,* 376 U. S. at 287. Such knowledge or recklessness is not present where it is shown that the

publisher relied on a dispatch which was filed by a reporter of proven reliability and which is internally consistent and not inherently improbable in light of known facts. *Butts and Walker, supra,* 388 U. S. at 156-59. The Court refers to the fact that the Life staff relied entirely on Chandler without conducting an independent investigation, but this Court has already held that failure to investigate, even in the light of awareness of "possible" falsity, is insufficient to show " 'the high degree of awareness of . . . probable falsity demanded by *New York Times . . . .*' " *Beckley Newspapers Corp.* v. *Hanks, supra,* 389 U. S. at 84. In short, the only thing that clearly emerges from the opinion below is that petitioner, for exercising its First Amendment right to report and comment on matters of public interest, faces a lengthy and costly trial of issues which are utterly irrelevant to the determination of the litigation.

The issue here is not whether the Life caption was true. Petitioner submits that it was true, and, if necessary, can prove that it was true. The issue is whether, consistent with the freedom of the press guaranteed by the First Amendment, respondent by bringing this action can force petitioner to expend thousands of dollars in a trial when the record on the motion for summary judgment shows that the publication dealt with a matter of public concern and that respondent cannot establish that petitioner published the caption with knowledge of falsity or serious doubts as to truth. If the publishing industry faced this prospect every time it printed an article of public interest, a ready weapon would be available to silence the press.

This case squarely presents to this Court a very real threat to the freedom guaranteed by the First Amendment. If petitioner is correct in its view of the First Amendment, then it is entitled to summary judgment, and is so entitled not merely as a matter of procedural law but as an indispensable part of its substantive rights. It is petitioner's substantive right to summary judgment which is at issue

here, and that right can only be vindicated by this interlocutory appeal. If immediate review is not available, the freedoms recognized in *New York Times* and subsequent cases will prove illusory. If doctrines developed to protect free expression are to be meaningful, it must be possible to obtain appellate review of lower court orders such as the orders here before running the gauntlet of trial. That is the necessary constitutional corollary to *New York Times.*

CONCLUSION

When a person engages in activity which is an appropriate and legitimate subject of public comment and concern, that person cannot defeat the constitutionally guaranteed freedom of expression of a publisher who reports that activity by raising spurious factual issues which do not go to the publisher's knowledge of falsity or reckless disregard of the truth. Summary disposition in such cases is required by the First Amendment, and this requirement presupposes the necessity for review of orders denying that right. For these reasons this petition should be granted.

April 15, 1970.

Respectfully submitted,

HAROLD R. MEDINA, JR.,
One Chase Manhattan Plaza,
New York, N. Y. 10005
Attorney for Petitioner.

FRATES, FAY, FLOYD & PEARSON,
WILLIAM S. FRATES,
LARRY S. STEWART,
12th Floor,
Concord Building,
Miami, Florida 33130

W. DENNIS CROSS
CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005
Of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

No. 66-907-Civ-EC

MARY ALICE FIRESTONE,

Plaintiff,

vs.

TIME, INC.,

Defendant.

ORDER DENYING SUMMARY JUDGMENT

This cause came on upon defendant's motion for summary judgment. The Court of Appeals has held that the complaint, as amended, adequately states a cause of action for libel per se and libel per quod. *Firestone* v. *Time, Inc.*, 414 F. 2d 790 (5 Cir. 1969). The alleged defamatory language need not be re-quoted here.

Defendant first contends that the article was constitutionally protected under the docrine of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and the subsequent cases that have expanded those concepts. The court is of the opinion that the plaintiff is not a "public figure" under those authorities. And, while the general subject of eavesdropping may be considered a "matter of great public con-

cern," certainly the plaintiff's private marital difficulties, as referred to in the article, are not of that character. Thus, while the general subject matter of an article might be protected, it does not follow that every particular reference therein is similarly immunized. It should also be stated that the fact that a publisher sees fit to refer to a particular individual in print does not establish the "public" character of the person or reference. The law in this area has not stretched so far as to allow the publisher to create its own defense to possible litigation.

Assuming the applicability of the constitutional defense, however, the plaintiff must come forward with evidence sufficient to show actual malice or reckless disregard for the truth. The article in question was researched and written (subject to editorial deletion) by one David Chandler, a "stringer"[1] employed by defendant. In support of its motion, defendant has submitted Chandler's affidavit and copies of his working notes. Chandler, by affidavit, states that he "never entertained any doubts as to the accuracy of the material contained in that article."[2] Richard Billings, the Life reporter ultimately responsible for the text of the article, stated by affidavit that "I relied entirely on Chandler's dispatches and on oral reports of telephone conversations Life reporter Patureau had had with Chandler."

In opposition to the motion, plaintiff has submitted the affidavit of plaintiff and Patureau's deposition. Mrs.

---

[1]A "stringer" is a reporter who works on a commission or hourly basis. He is not a member of the full-time reporting staff and is assigned to cover matters that do not warrant coverage by full-time reporters. Deposition of Patureau, pg. 16.

[2]It should be noted that while Chandler's notes contain the conclusion that Carl Geisler, Jack Harwood's assistant, "sold out" to work for plaintiff, there is nothing in Chandler's notes to indicate that plaintiff played any active role in procuring this transfer of allegiance.

Firestone stated that she was approached by Mr. Chandler who offered to write a complimentary story if she would engage in sexual activity with him. When she refused, Chandler "stated that she would be sorry."

Patureau was the Life employee assigned to check the article "for accuracy." However, under the defendant's procedures then in effect, this only consisted of ascertaining whether the final copy accurately reflected what was submitted by the stringer. No independent effort was made to verify any of the statements so submitted and the article in question was published as submitted by Chandler. Patureau testified that no verification was made or attempted, nor was it Patureau's job to do so.[3]

Clearly, the article could have been written in such a way that plaintiff would not have been implicated. "Admittedly, journalistic flair and pungency might have been sacrificed, but the law of defamation is not grounded on considerations of whether or not the article in question provides provocative or entertaining reading." *Ragano* v.

---

[3]Patureau, resisting some degree of pressure, refused to sign an affidavit that was submitted to him by defendant and which contained the following language:

> The entire article . . . [was] the subject of an intensive investigation, detailed and thorough checking and careful editorial scrutiny. It was my duty, which I performed, to verify the accuracy of each fact contained in that caption and I checked each and every word to assure its accuracy. As a result thereof, I formed the conclusion which I hold to this day that everything in the article is absolutely accurate and true; I have never and I do not now have any doubts concerning the veracity and accuracy of any statement in the article.
> (Plaintiff's ex 6 to Patureau's deposition).

Time, 302 F. Supp. 1005, 1010 (M.D. Fla. 1969). This case presents issues of fact that should be submitted to a jury.

Upon consideration, it is,

ORDERED and ADJUDGED:

1. That the motion for summary judgment filed on behalf of the defendant, Time, Incorporated, be and the same is hereby denied.

2. The defendant's application for certification pursuant to Title 28, U. S. C. § 1292(b) is considered by the Court to be appropriate in that this order does involve a controlling question of law as to which there is substantial ground for difference of opinion and a prompt appeal may materially advance the ultimate determination of the litigation.

3. An application for an interlocutory appeal shall operate as a stay of further proceedings in this Court if said application is timely filed. In the event that no such application is filed this cause shall be scheduled for pretrial conference.

DONE and ORDERED at Miami, Florida, on this 2nd day of December, 1969.

EMMETT C. CHOATE
SENIOR UNITED STATES
DISTRICT JUDGE

cc: Jos. D. Farish, Jr., Esquire
Larry S. Stewart, Esquire

BLEED THROUGH POOR COPY

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Misc. No. 1566

TIME, INC., a New York Corp., *Petitioner,*

versus

MARY ALICE FIRESTONE, *Respondent.*

ON APPLICATION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER

Before GEWIN, GOLDBERG* and DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Southern District of Florida entered on December 2, 1969, in the above styled and numbered cause, is hereby DENIED.

*Judge Goldberg took no part in the consideration of or decision on this Application.

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

March 24, 1970

TO ALL PARTIES LISTED BELOW

Re: Misc. No. 1566—TIME, INC., Etc.

vs.

MARY ALICE FIRESTONE

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By FRANCES WOLFF
Deputy Clerk

cc: MESSRS. LARRY S. STEWART
WILLIAM S. FRATES
MR. HAROLD R. MEDINA, JR.
MR. JOSEPH FARISH, JR.

BLEED THROUGH POOR COPY